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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 1041 102

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

JAMES B. BERRY SONS COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Atlantic Refining Company, a corporation of Pennsylvania, respectfully prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review a decision and order of that court entered February 28, 1940 denying a petition to vacate and set aside a void order of that court entered September 27, 1939.

A transcript of the Record in this case, including the proceedings in said Circuit Court of Appeals, is filed herewith in accordance with Rule 28 of this court.

Questions Presented.

1. Where a Circuit Court of Appeals has entered an order reversing the judgment of the court below and subsequently, on a rehearing, is equally divided, one judge filing an opinion that its former order should be reversed, the second judge simultaneously filing an opinion that it should be sustained and the third judge being then dead, can the court, thus equally divided, enter a lawful order reversing its former order?

2. Where the judges of the court are equally divided on a rehearing, can an order thereon, pursuant to the decision of one judge, and purporting to reverse the previous order of the court, be made legally effective by the fact that the other judge, who dissents from the decision, joins in authorizing the entry of that order?

The questions presented appear never to have been decided by this Court. They involve no issues of fact but solely of law.

Summary and Short Statement of Matters Involved.

In the above entitled suit in equity brought by Petitioner against Respondent in the United States District Court for the Western District of Pennsylvania, the District Court entered a decree dismissing the Bill of Complaint (R. 635).

On appeal the Circuit Court of Appeals for the Third Circuit (Biggs and Buffington, Circuit Judges, and Dickinson, District Judge, sitting), rendered and filed on December 21, 1937 a unanimous opinion of said three Judges reversing the decree appealed from (R. 660b). On rehearing the same three Judges rendered and filed on December 21, 1938 a second unanimous opinion stating that the court "finds no reason to differ from its former holding", and that "After rehearing and full consideration we are con-

firmed in our prior conclusion" (R. 660v). Thereupon, on December 21, 1938, the court entered its order adjudging "that the decree of the said District Court in this cause be, and the same is hereby reversed" (R. 660dd). Thereafter, on May 10, 1939, the appeal was argued on second rehearing.

Judge Dickinson died on or about September 16, 1939.

Thereafter, on September 27, 1939, there were rendered and filed, "Sur Second Rehearing", two conflicting opinions: (1) an opinion per "Biggs, Circuit Judge" (R. 660nn), which concludes as follows:

> "We therefore reverse our former conclusions and hold that the claims *sub judice* are invalid for want of invention.
>
> Accordingly, the decree of the court is affirmed."

and then follows the statement:

> "*Judge Dickinson participated in this decision."

and (2) an opinion per "Buffington, J." (R. 660eee) which contains the following:

> "I have seen no reason in these protracted hearings and rehearings to differ from the facts and reasoning then stated [in the previous decisions of the court]. * * * Such being my unchanged view, I am constrained to file this respectful but earnest dissent."

There was entered on September 27, 1939 a purported order of said Circuit Court of Appeals signed "John Biggs, Jr., Circuit Judge" (R. 660lll), providing that

> "the Decree of the said District Court in this cause be, and the same is hereby affirmed, with costs."

This purported order, reversing the earlier decree of the Circuit Court of Appeals (R. 660dd), was void and of

no legal effect, we submit, because of the extraordinary circumstances under which it was entered, and which were made known by the *per curiam* opinion on petition to vacate, referred to below.

After Petition to this Court for Writ of Certiorari on the sole question of the validity of the patent in suit had been filed and denied (308 U. S. 623), the Clerk of said Circuit Court of Appeals on January 8, 1940 issued a purported mandate to the District Court based upon said purported order of September 27, 1939.

Petitioner, on January 27, 1940, brought this proceeding, entitled in the same cause, by petitioning the said Circuit Court of Appeals to vacate said purported order as being void in law, and to recall its said purported mandate, and to issue instead its mandate in conformity with said unanimous opinions and order of December 21, 1938; or, in the alternative, to set the case for rehearing (R. pp. 660nnn-660rrr).

On February 28, 1940, a *per curiam* opinion "Before Biggs and Buffington, Circuit Judges" (R. p. 660rrr), was filed by said Circuit Court of Appeals stating that its order of September 27, 1939

> "was the order of this court since Judge Buffington joined in authorizing its entry.
> Accordingly the Petition for Rehearing is denied."

On the same day said Circuit Court of Appeals entered an order signed by Circuit Judges Biggs and Buffington (R. p. 660sss) that

> "the petition for rehearing in the above entitled case is hereby denied."

From the *per curiam* opinion quoted, it now appears that the Circuit Court of Appeals did not choose to rely on any *post mortem* effect of Judge Dickinson's participation in the case to support the purported order of September 27,

1939, but attempted to justify its position on the stated ground that Judge Buffington, while dissenting to the reversal, joined in authorizing the entry of the order which purports to effectuate it.

Reasons Relied Upon for the Allowance of the Writ.

The action of the court below in refusing to vacate the purported order of September 27, 1939, which order is not based upon the judgment of the court because it is contrary to the judgment of one of the two judges constituting the court, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this Petition should be granted.

Respectfully submitted,

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y., May 24, 1940.

I hereby certify that, in my opinion, the foregoing petition for writ of certiorari is well founded in point of law. It is not filed for delay.

THEODORE S. KENYON,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.....

THE ATLANTIC REFINING COMPANY,
Petitioner,

vs.

JAMES B. BERRY SONS COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Court below.

The opinion of the District Court is reported in 14 F. Supp. 891 appearing at pages 628-634 of the record. The three opinions of the Circuit Court of Appeals are reported in 106 F. (2d) 644, 647 and 650, respectively, and appear at pages 660b, 660v and 660nn of the record. The *per curiam* opinion of the Circuit Court of Appeals denying plaintiff's petition appears at page 660 rrr of the record.

Jurisdiction.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C. §347), and under Section 262 of the Judicial Code, Act of March 3, 1911 (28 U. S. C. §377). The case is within the jurisdiction of the Court as to subject matter, since it arises under the patent laws. The decision and order sought to be reviewed were entered February 28, 1940.

Cases believed to sustain jurisdiction are:

As to grant of writ of certiorari for providing relief from a void decree:

American Construction Co. v. *Jacksonville T. & K. W. R. Co.; Same* v. *Pennsylvania Co. for Insurance on Lives and Granting of Annuities,* 148 U. S. 372, 386-8 (1892);
Amedee D. Moran, et al., v. *Charles Dillingham,* 174 U. S. 153 (1899), and
Rexford v. *Brunswick-Balke-Collender Co.,* 228 U. S. 339 (1913).

As to review predicated upon an order ruling upon an application for the vacating of a decree:

Benjamin D. Harris v. *William Hardeman, et al.,* 14 How. (55 U. S.) 334, 338 (1852);
Stevirmac Oil & Gas Company v. *C. E. Dittman, et al.,* 245 U. S. 210, 211, 214 (1917);
Swift & Company, et al., v. *United States of America,* 276 U. S. 311, 322-3 (1928).

Specification of Errors to be urged.

The errors which Petitioner will urge, if the Writ of Certiorari is allowed are—

1. The Third Circuit Court of Appeals erred in refusing to vacate its purported order of September 27, 1939 and its purported mandate of January 8, 1940, and in failing to recall the said mandate and issue a mandate based upon its order of December 21, 1938.

2. The Third Circuit Court of Appeals erred in refusing to vacate the purported order of September 27, 1939,

reversing its earlier order, there being no legally effective judgment of a majority of the court sustaining the said purported order.

3. The Third Circuit Court of Appeals erred in refusing to vacate the purported order, where the court at the time of entering the said purported order was equally divided and one of the two judges constituting the court filed an opinion dissenting therefrom on the merits, but at the same time joined in authorizing the entry thereof.

Summary of Argument.

In point of legal effect Judge Dickinson did not participate in the decision on second rehearing below.

The joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order where it is not, in fact, based upon the judgment of a majority of the court.

The legal effect of the equal division of the court below on second rehearing was to leave the case *in statu quo* and to leave in force the previous order of the court entered December 21, 1938.

It was the duty of the court below to vacate the purported order of September 27, 1939, since on the facts appearing in its *per curiam* opinion of February 28, 1940 the purported order is void in point of law.

ARGUMENT.

Point 1. In point of legal effect Judge Dickinson did not participate in the decision on second rehearing below.

On September 27, 1939, when the court below purported to perform its judicial function in deciding the case on second rehearing by the filing of opinions of Judges Biggs

and Buffington and the entry of the purported order affirming the decree below, Judge Dickinson's power to participate in that judicial function had already terminated by reason of his death.[1] Prior to the actual filing on that date, no one of the judges was bound by anything that had been said or written concerning decision of the case on second rehearing. Their opinions were locked in their own bosoms and could be revised or reversed at will. They had no legal force or effect upon any one.[2]

Prior to Judge Dickinson's death whatever had been written was, at most, a draft opinion having no force in law. After his death there was no longer a majority of the court in favor of any opinion. Neither of the opinions subsequently filed was in legal effect the opinion of the court. They were the individual opinions of the judges filing them, and each was entitled to equal respect.

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[1] *Freeman on Judgments*, 5th Ed. §58; *Wilson* v. *Rodenwald*, 61 Miss. 228, 232-233; *Wyman* v. *National Broadway Bank*, 59 Howard's Pr. Rep. 331, 331-3 (N. Y. 1880); *Commissioners of Highways* v. *Drainage Commissioners*, Second District Appellate Court, Illinois, Gen. No. 5828, Opinion filed July 31, 1914, reported in abstract only, 188 Ill. App. 6; *Broder* v. *Conklin*, 98 Cal. 360, 362, 363; 33 P. 211, 212-3; *Connolly* v. *Ashforth*, 98 Cal. 205, 206; *Ellis* v. *Rector*, 32 Mich. 378, 379; *Cain* v. *Libby*, 32 Minn. 491, 492; *Marcellus* v. *Wright*, 61 Mont. 274, 285.

[2] Opinions of judges are subject to their revision and reversal and are not binding upon any one until rendered or made of record, *Houston* v. *Williams*, 13 Cal. 24, 27 (Opinion by Judge Field, later Mr. Justice Field); *Anglo-Californian Bank* v. *Mahoney Mining Co.*, 1 Fed. Cases 919, 920; *Judson, et al.*, v. *Gage*, 98 Fed. 540, 542-3; and are "until then * * * but a purpose in the breast of the judge which could be changed as he might determine", *Broder* v. *Conklin*, 98 Cal. 360, 364.

The notation at the end of Judge Biggs' opinion that Judge Dickinson participated therein could no more alter the legal effect than it could resurrect the deceased judge or extend his term of office that had expired by act of God.

In legal effect Judge Dickinson did not participate in the decision. His power to break the tie died with him.

Point 2. The joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order where it is not, in fact, based upon the judgment of a majority of the court.

The entry of an order is a purely ministerial act that may be performed by any judge of the court provided it is supported by the requisite majority decision of the judges of the court.[3] But there must first be a valid judgment of the court, *i.e.*, a majority decision of the judges, before any ministerial act in respect of a judgment is effective, for what is adjudged by the court, not what is entered, constitutes the judgment,[4] and the power or authority behind a judgment, rather than the result reached, determines its validity and immunity from attack.[5] An order unsupported by a valid judgment is an "illegal thing" which should be removed from the record.[6]

The joinder of a dissenting judge in authorizing the entry of such an order does not make it effectual in law, for it is the duty of courts to decide cases according to the judicial conscience of the judges and not according to

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[3] *Dohany* v. *Rogers*, 281 U. S. 362, 369; *Freeman, Judgments* (5th Ed.) §46.

[4] *Freeman, Judgments* (5th Ed.) §§46, 47; *Myers* v. *Consumers Coal Co.*, 212 Pa. State Rep. 193, 200.

[5] *Freeman, Judgments* (5th Ed.) §§333, 354.

[6] *Summers* v. *Kramer*, 271 Pa. 189, 195-6.

their actions contrary to conscience.[7] In the matter of *Kings County Elevated Railroad Company,* 78 N. Y. 383, 385 (1879), the court said of a case where only two judges were present, although the third transmitted in writing his concurrence with one of those judges:

> "A single member can decide nothing, and an assent of one where two only are present, that a judgment may be entered, in which he does not concur, but from which he dissents, is not sufficient to render such judgment effective."

Point 3. The legal effect of the equal division of the court below on second rehearing was to leave the case *in statu quo* and to leave in force the previous order of the court entered December 21, 1938.

It is settled law of the State of Pennsylvania, in which this litigation arose, that where a court is equally divided, a motion or rule before it falls and the case remains *in statu quo.*[8] Since, under modern authority, the granting of

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[7] "The court has no more moral or judicial right to violate the sanctity of its own conscience than it has to violate the rules of law. When a question is addressed to discretion, the obligations of conscience are as imperious as those of law when the question is addressed to the law. And if a party is successful in convincing the conscience of the court, that justice, consistently with the rules of law, requires the interposition of its discretionary action, he is as much entitled to it, as when he claims the benefit of the positive rules of law, and the court is as much bound to render that justice which he asks." *Goddard* v. *Coffin,* 10 Fed. Cas. 505, 509.

[8] *Madlem's Appeal,* 103 Pa. 584, 586-7; *Summers* v. *Kramer,* 271 Pa. 189, 194-6; *First Congressional District Election,* 295 Pa. 1, 12-13; and see *Carmichael* v. *Eberle,* 177 U. S. 63 (1900); *Goddard* v. *Coffin,* 10 Fed. Cas. 505, at p. 508.

a motion for rehearing does not set aside the former judgment of a court or vacate the entry thereof,[9] the equal division of the court, on rehearing as to a judgment of reversal previously entered, leaves that judgment in force and does not result in affirming the judgment of the lower court.[10]

Point 4. It was the duty of the court below to vacate the purported order, since on the facts appearing in its *per curiam* opinion of February 28, 1940 the purported order is void in point of law.

The *per curiam* opinion, here sought to be reviewed, shows that the judges below, though equally divided, purported to effect a result that could only be valid and legally effective if based upon the judgment of a majority of the court, a judgment which did not exist. The judges either singly or together were without power or jurisdiction to effect this result, contrary to the conscience and expressed opinion of the dissenting judge. Being without power or authority, under the existent circumstances, to render the judgment contained in the purported order of September 27, 1939, it was the duty of the court below to vacate the same upon petitioner's application.[11] Their refusal to vacate the void order constituted such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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[9] *Kieckhefer Box Co.* v. *John Strange Paper Co.*, 180 Wis. 367, 392; *White* v. *Crandall*, 105 Fla. 70, 90; 4 *Corpus Juris Secundum*, 2043, §1446.

[10] *Florida Motor Lines* v. *Hill*, 106 Fla. 33; 143 So. 261, at pages 262, 263; 4 *Corpus Juris Secundum*, 2048, §1451.

[11] *Freeman, Judgments*, 5th Ed. §226, and see cases cited on page 8, *supra*.

CONCLUSION.

Since the *per curiam* opinion of the court below, given in support of its refusal to vacate the void order, has now disclosed the entire lack of legal basis for the order, the Petitioner respectfully prays that this court exercise its power of supervision so that the injustice of the decision below in decreeing a result contrary to the unanimous judgments previously rendered, may be reviewed and corrected in accordance with law.

Respectfully,

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y.,
May 24, 1940.

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

Respondent's brief misses the point of the petition and argues matters that are not in issue.

"At the threshold", it begins, "we would emphasize that the instant petition, filed May 25, 1940, seeks a review of exactly the same decision, or judgment, which this court refused to review when on January 2, 1940, it denied petitioner's first petition." Similarly, the main point of respondent's argument (pages 7-9) is that the instant petition seeks the same relief as the first petition.

Neither contention is accurate in fact or in substance.

Obviously the decision sought to be reviewed is not the same, for the instant petition seeks review of the order entered February 28, 1940 by the Circuit Court of Appeals (R. 660 s s s), whereas the first petition sought review of the judgment of that court entered September 27, 1939 (R. 660 1 1 1).

The relief sought is not the same, for the instant petition seeks the vacating of a judgment because it is void by reason of the extrinsic facts incident to its entry—the court consisting, on the date of entry, of but two judges whose individual opinions, contemporaneously filed, were exactly contradictory—whereas the first petition sought only the reversal of a judgment because of its inherent judicial errors.

There is no contention here concerning the merits. The contention here is that a void judgment can determine nothing and should be set aside. Respondent has overlooked or disregarded these fundamental differences which are controlling.

The distinction between judgments that are erroneous and judgments that are void is clearly established.[1] Relief from judgments that are erroneous is by review on the merits. Relief from judgments that are void is by order setting them aside without regard to the merits.[2]

Respondent's brief begs the issue raised by the instant petition,[3] and seeks to divert attention therefrom by reciting facts and presenting arguments relating solely to the merits.

RESPONDENT'S POINT I.

Asserting that the instant petition seeks the same relief as the previous petition which this Court denied, Respondent's first point is that "the instant petition is not timely filed" (page 7).

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[1] "The line which separates error in judgment from usurpation of power is very definite." *Vorhees* v. *Jackson*, 35 U. S. (10 Peters) 449, 474.

[2] *Moran* v. *Dillingham*, 174 U. S. 153, 158.

[3] It says (p. 13) that "we deem it unnecessary to discuss" the cases cited by Petitioners which establish the invalidity of the decree sought to be vacated and the effect thereof.

Both the premise and conclusion are faulty.

The premise is at fault, as we have pointed out, because the instant petition seeks the setting aside of the purported judgment of September 27, 1939, as a void judgment, whereas the previous petition sought review for correction of judicial error.

The purported judgment is void (1) because, in point of legal effect, Judge Dickinson did not participate in the decision on second rehearing below[4], and (2) because the joinder of a dissenting judge in authorizing the entry of an order cannot give legal effect to that order, where it is not, in fact, based upon the judgment of a majority of the court.[5] The purported judgment is thus void for prejudicial irregularity and lack of power,[6] and the court was without jurisdiction to render it.[7] In seeking to vacate that void judgment because the court below had no power to enter it, the petitioner is not seeking the same relief as was sought by the previous petition on the merits.

Nor is the denial of the previous petition any bar to the present proceeding. For it has been repeatedly held that an attempted review or even a complete review of a pur-

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[4] See Point I of our Petition, pages 9-11 thereof.

[5] See Point II of our Petition, pages 11-12.

[6] *Freeman, Judgments,* 5th Ed., §§217, 218.

[7] "There are in general three jurisdictional elements in every valid judgment, namely jurisdiction of the subject matter, jurisdiction of the person and *the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated *at any time,* whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without suggestion." *Freeman, Judgments,* 5th Ed., §226, pp. 44-5. (Italics ours.) See also *Wilson, Admr.* v. *Walker,* 109 U. S. 258, 265-267; *Windsor* v. *McVeigh,* 93 U. S. 274, 283.

ported judgment of a lower court does not limit or affect the right subsequently to have the judgment set aside as void for lack of jurisdiction or power of the court rendering it,[8] even though the judgment had been affirmed[9] and the facts, relied upon to show that it was void, had been in the record at the time of the appeal and the same relief could have been granted on that review.[10] A void judgment cannot be validated by consent, either actual or tacit,[11] nor even by affirmance on appeal.[12]

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[8] *Gouveia* v. *Nokamura*, 13 Hawaii 450, 452; *Scott* v. *Watkins*, 25 C. A. (Colo.) 340, 343; *Patterson* v. *Hochster*, 21 App. Div. (N. Y.) 432, 434.

[9] *Chambers* v. *Hodges*, 23 Texas 104.

[10] *Ensminger* v. *Powers*, 108 U. S. 292, 27 L. Ed. 732, 736.

[11] *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 18; *Frozen Egg Products* v. *U. S.*, 226 U. S. 172, 184; *Cutler* v. *Rae*, 48 U. S. 729, 731. As to acts beyond the power of the courts or after termination of a judge's term of office, see *Kurtz* v. *Cutler*, 178 Cal. 178, 181; *Freeman, Judgments*, 5th Ed. §354; 33 C. J. 963, §86. In *Chambers* v. *Hodges*, cited in footnote 9, the Appellate Court had previously affirmed the judgment below. Motion was subsequently made to set the judgment aside on the ground that the deciding judge was disqualified by interest (rather than by death, as in the case at bar). In ordering the judgment set aside, the court said at pages 112-113: "We conclude that the presiding judge being interested, was absolutely incapacitated to take cognizance of, or sit in the case. The consent of parties could not remove his incapacity, or restore his competency against the prohibition of the law; which was designed not merely for the protection of the party to the suit, but for the general interests of justice. And, consequently, the judgment rendered by him was a nullity, and left the case remaining undisposed of, as completely *as if the judge had not been present at the court.*" (Italics ours.)

[12] *Gille* v. *Emmons*, 58 Kan. 118; *Pioneer Co.* v. *Maddux*, 109 Cal. 633, 642; and *Freeman, Judgments*, 5th Ed., §322.

Hence, neither the filing of the previous petition nor the reference therein to Judge Dickinson's death constituted a waiver of, nor estoppel to deny, the invalidity of the September, 1939 judgment, nor was denial of that petition a bar to the instant proceeding to vacate that judgment as void.[13]

Respondent's conclusion that the petition to vacate was not timely filed is as faulty as its premise. For petitions to vacate void judgments are the appropriate remedy,[14] and are not limited as to time—mere lapse of time, unless amounting to laches, being immaterial.[15] No laches exist or are suggested in the case at bar.

Since it is clear that the relief here sought, *i. e.*, that a void judgment be vacated or set aside, is not the relief sought by the previous petition, *i. e.*, that an erroneous judgment be corrected, the comments on page 8 of respondent's brief are beside the point.

Specifically, this is not a case of a renewed and untimely application, but of a special proceeding to clear the record of a void order, a type of proceeding never barred by lapse of time alone.[16]

Again, the fact that certiorari on the merits was sought and denied has no bearing whatever on the power of the court below to enter the purported judgment, nor is it any bar to this proceeding to expunge that judgment.[17]

Nor is there any element of *res adjudicata* or of waiver. No question as to the merits is presented here. Nothing

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[13] *Atlantic Coast Line R.R. Co.* v. *Powe*, 283 U. S. 401, 403.

[14] *Wetmore* v. *Karrick*, 205 U. S. 141, 151.

[15] *Freeman, Judgments*, 5th Ed., §217; 34 C. J. 255, §486; *Ex parte Crenshaw*, 40 U. S. (15 Peters) 119; and see footnote 7 above.

[16] See footnote 15 above.

[17] See footnotes 8-13 above.

contained in or omitted from the previous petition could serve to validate the void judgment of the court below, which, lacking a majority, that court had no power or jurisdiction to enter.

And finally, as to the jurisdiction of this Court herein, respondent has failed to perceive that three of the cases cited in our petition (page 8), and to which respondent makes no reference, support the proposition that petition for certiorari is the proper procedure by which to bring to this Court application orf relief from a void decree; the other three, to which respondent refers, are cases in which this Court has exercised its jurisdiction to review the orders of lower courts which ruled upon applications for the vacating of decrees,—the situation of the case at bar.

For the reason that the relief here sought is distinct in fact and law from that sought by the previous petition, and goes to the power and jurisdiction of the court below to enter the September 1939 judgment, it is submitted that respondent's objection to the grant of the instant petition, stated in Point I of its brief, is unsound and should be overruled.

RESPONDENT'S POINT II.

Respondent's argument under this head is without merit for two reasons. First, it assumes and asserts, as matter of fact (pages 8 to 11), that the case was decided before Judge Dickinson's death. Second, it assumes, as matter of law, and without shadow of authority, that a decision unannounced until after a judge's death is as valid as if rendered during his life time.

Refuting the assertion of fact is the Memorandum entered by the court below (R. 660 m m) and quoted at pages 3-4 of respondent's brief, which states:

> "And afterwards, to wit, on the 27th day of September, 1939 * * * the Court, **now** being fully advised in the premises, renders the following decision." (Boldface ours.)

By its own record, the court thus places the rendering of its decision on September 27, 1939, and it speaks only as of that date. Judge Dickinson died on September 16, 1939.

But whether or not the judges had agreed among themselves before that date is of no legal consequence. For the cases are unanimous that so long as a decision lies in the breast of a judge and is not rendered or entered, it has no legal effect whatever.[18]

Respondent does not and cannot deny this established principle. The only case it cites (page 11) is one in which the judgment in question had been formally *entered* before the death of the judge (see *Insurance Co.* v. *Wilson,* 33 U. S. 291, top of pages 292 and 293). The judicial act of rendering and entering decision had thus been completed before the death of the judge. The signing of the judgment, after its entry, was but a ministerial duty "and not a judicial act". (Same case, at page 304.) Here, however, the judicial act remained undone at the time of Judge Dickinson's death. No associate or successor could subsequently perform that judicial act for him. No statement or footnote in Judge Biggs' opinion could give the legal effect of a duly rendered decision to what Judge Dickinson might have said in conference. The attempt to attribute to Judge Biggs' opinion the force of an opinion of two concurring judges was a prejudicial irregularity and a usurpation of power. His opinion was his own and nothing more. There were not three judges of the court but only two on the date when the judicial act was performed. And lacking the required majority of the court on that date the purported majority opinion and judgment were in law utterly void.

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[18] See page 10 of brief in support of the instant petition.

RESPONDENT'S POINT III.

In support of this point respondent relies upon *dicta* in two cases which are not in fact authority for respondent's proposition. In *Hook* v. *Mercantile Trust Co.*, 95 Fed. 41, the point actually decided is that an order granting rehearing has the effect of keeping the cause pending in the appellate court, so that a motion to dismiss for lack of "summons and severance" subsequently filed is not defective on the ground of being filed too late. The court held that such a motion "is jurisdictional * * * and may be raised at any time before final disposition of the appeal". Hence the matter italicized in respondent's brief was unnecessary to the decision.

In the other case cited by respondent (page 12), *United States* v. *Bentley & Sons Co.*, 293 Fed. 229 (D. C., S. D. Ohio), the only question under consideration in the portion of the opinion referred to was whether a prior decision of another court was entitled to a controlling status where rehearing had been granted and the judgment subsequently affirmed on rehearing.

Neither of these cases involved decision of the point here in issue.

Respondent does not discuss nor attempt to distinguish the decision in *Florida Motor Lines* v. *Hill*, 106 Fla. 33, 143 So. 261, cited on page 13 of our petition. That case is on all fours with the case at bar both with respect to the rules of court relating to rehearings and to the particular terms of the order granting the rehearing.

As to the rules, the court there said:

> "Petitions for rehearing are under our rules filed and considered as ex parte matters.
>
> "The granting of such petitions when they are favorably acted upon, is likewise ex parte."
>
> * * * * *

"And, unless expressly so ordered by the Appellate Court, the mere granting of an ex parte application for a rehearing should not be considered nor construed as working a complete vacation, annulment, and setting aside of the previous judgment of the Appellate Court, as to which the rehearing is granted, but more properly should be considered as a mere arresting or suspending of such previous Appellate judgment pending the rehearing and reconsideration of the case on the rehearing awarded.

"This rule necessarily applies to all cases where the court grants a rehearing on ex parte application of one of the parties asking reconsideration of the case for some alleged oversight or error in the court's initial opinion or judgment in the case."

As to the orders, the Florida court said:

"In this case the order entered by us on the petition for rehearing is: 'A petition for rehearing having been filed in this cause and same having been duly considered, it is ordered by the Court that the said petition be and the same is hereby granted.' No order affirmatively vacating or setting aside our former judgment of reversal was entered. The only order appearing in our minutes is that the petition for rehearing 'be and the same is hereby granted.' "

The order of April 20, 1939 (R. 660 m m m), referred to at page 12 of respondent's brief, is a substantial counterpart of that quoted in the Florida case. The order does not purport to vacate the judgment of December 21, 1938 (R. 660 d d) nor has it any such effect.

The Florida court said of its corresponding order:

"This order under our rules had the effect of arresting the issuance of the mandate until further order of the Court. It also reinstated the case upon our docket for reconsideration upon the rehearing ordered. Thus the original judgment of this Court that the judgment of the Circuit Court be reversed was merely suspended, and not annulled, vacated or set aside, as might have been done by a special and affirmative order to that effect entered at the term during which rehearing was granted."

The Florida case is, we submit, indistinguishable on its facts from the case at bar. Additional citation of authority to the same effect will be found on page 13 of our brief in support of petition.

On principle, as well as authority, we submit that where an Appellate Court has twice unanimously given judgment for plaintiff, it is contrary to equity and justice that the plaintiff should be defeated when on second rehearing the court finds itself equally divided.

CONCLUSION.

In view of this injustice and of the fact that respondent has by its failure to discuss the authorities cited in our petition substantially admitted that the September, 1939 judgment is void for lack of power in the court to enter it, and because respondent's objections to the petition are technical and unsound, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully,

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y.,
August 16, 1940.

FILED
JUL 3 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 102.

THE ATLANTIC REFINING COMPANY, *Petitioner*,

v.

JAMES B. BERRY SONS' COMPANY, INC., *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS G. HAIGHT,
WILLIAM F. HALL,
Counsel for Respondent.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

At the threshold we would emphasize that the instant petition, filed May 25, 1940, seeks a review of exactly the same decision, or judgment, which this court refused to review when on January 2, 1940 it denied petitioner's first petition for a writ of certiorari, filed on November 22, 1939.

The decision, or judgment, in question was filed in the Circuit Court of Appeals for the Third Circuit on September 27, 1939, and affirmed the decree of the District Court for the Western District of Pennsylvania finding invalid patent 1,680,421, granted August 14, 1928 to petitioner as the assignee of J. W. Lewis, Jr.

The present petition, filed approximately eight months after the filing of the decision or judgment sought to be reviewed, merely urges an additional ground, in support of the relief sought, which petitioner elected not to suggest in its first petition.

No petition for rehearing was filed in the Circuit Court of Appeals pursuant to rule 27 of that court (224 F. xviii) but petitioner proceeded forthwith to file here its first petition aforesaid bottomed upon the ground that the Circuit Court of Appeals had applied a fallacious rule of law in affirming the decree of the District Court.

Manifestly for circumventing a charge of laches based on its failure to raise its present point in the Circuit Court of Appeals by petition for rehearing, or suggest it in its first petition filed in this court, petitioner presented in the Circuit Court of Appeals on January 27, 1940, a petition praying for the recall of the mandate, for the vacation of the decision of September 27, 1939, and for such further and other relief as the court might deem just.

The petition now at bar purports to be from the denial on February 28, 1940 of the last referred to petition, which the Circuit Court of Appeals termed a "petition for rehearing".

CHRONOLOGY OF FACTS.

We think it important that the Court should have before it the following chronology of facts in this case:

1. The bill of complaint which was filed on November 20, 1933 (R. 6) stated an ordinary patent infringement case.

2. The decree of the District Court finding the patent declared upon invalid and dismissing the bill with costs was filed May 4, 1936 (R. 635).

3. An appeal having been prosecuted to the United States Circuit Court of Appeals for the Third Circuit, the case was argued before said court constituted of Judge Buffington and Judge Biggs, Circuit Judges, and Judge Dickinson,

District Judge. It was taken under advisement (R. 660a), and thereafter a decision was rendered (R. 660b-660g) which is found in the final paragraph of an opinion by Judge Buffington and which reads as follows (R. 660g):

> "It follows, therefore, the record must be remanded to the court with instructions to reinstate the bill, enter a decree of infringement and accounting."

The transcript does not show an order on said decision.

4. A petition for rehearing was filed (R. 660h-660t), and was granted on April 6, 1938 (R. 660u).

5. The case was reargued on May 3, 1938 before the judges who constituted the court upon the original argument (R. 660u), was taken under advisement, and thereafter a decision was rendered (R. 660v) which is found in the final paragraph of an opinion written by Judge Biggs, and reads as follows (R. 660dd):

> "As stated in our prior opinion the decree of the court below is reversed and the cause is remanded to the court below with instructions to reinstate the bill of complaint and enter a decree of infringement and for an accounting."

6. An order on said decision, signed by Judge Biggs alone, was filed December 21, 1938 (R. 660dd).

7. A petition for second rehearing was thereupon filed (R. 660ee-660ll).

8. An order granting said petition was filed in the case April 20, 1939 (R. 660mm).

9. The case was called May 10, 1939 for a second reargument before the same judges who heard the previous arguments. The record contains a memorandum reading (R. 660mm):

> "And afterwards, to wit, on the 27th day of September, 1939, come the parties aforesaid by their coun-

sel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:".

Thereupon follows an opinion by Judge Biggs, concluding with the following (R. 660yy):

> "We therefore reverse our former conclusions and hold that the claims sub judice are invalid for want of invention.
>
> "Accordingly, the decree of the court below is affirmed.
>
> "*Judge Dickinson participated in this decision."

A "dissenting opinion" by Judge Buffington (R. 660eee-660kkk) states, *inter alia*, as follows (R. 660iii):

> "Subsequently another rehearing was granted, the case again heard and considered, with the result that an opinion is now filed which holds the patent void of patentability."

10. On September 27, 1939 there was duly filed an order by the court signed by Judge Biggs, *Circuit Judge*, adjudging and decreeing that the decree of the *District Court* be affirmed with costs (R. 660lll).

11. On November 22, 1939, petitioner filed in this Court a petition praying in the *first* paragraph thereof "that a writ of certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review a *decision*[1] of that court entered September 27, 1939 (R. 660nn)". The petition concluded as follows:

> "Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the *judgment* of the Circuit Court of Appeals for the Third Circuit should be granted."

12. This petition was denied on January 2, 1940.

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[1] Where italics are used in quotations, it will be understood that the emphasis is ours unless otherwise noted.

13. A mandate thereupon issued out of the Circuit Court of Appeals on January 8, 1940 (R. 660mmm).

14. On January 27, 1940, long after the expiration of the period for filing a petition for rehearing in the Circuit Court of Appeals, and on the very day that the time expired for filing a petition for rehearing in this Court of its denial of the petition for certiorari, petitioner filed in the Circuit Court of Appeals for the Third Circuit a petition for

> "the vacation of the purported decision and decree of this court filed herein September 27, 1939, for the recall of the purported mandate issued herein by the clerk of this court January 8, 1940, and for such other and further relief as this court shall deem to be just" (R. 660nnn).

This petition was based on the fact that Judge Dickinson had died before the written decision and the order thereon, or judgment, was filed, and that Judge Buffington had written a dissenting opinion.

15. On February 28, 1940, a per curiam memorandum was filed reading as follows (R. 660rrr):

> "The order entered in this cause upon September 27, 1939 was the order of this court since Judge Buffington joined in authorizing its entry.
> "Accordingly the *petition for rehearing* is denied."

16. On the same day there was received and filed an order signed by Circuit Judges Biggs and Buffington denying the *petition for rehearing* (R. 660sss).

ARGUMENT.

As a preliminary to a discussion of the ground upon which the instant petition for certiorari is based, we would call attention to the fact that in respondent's brief in opposition to the first petition for certiorari it was pointed out that the petition (and the same applies to the instant one) was peculiarly without merit because:

(a) The suit was an ordinary patent suit involving the usual questions of validity and infringement. There was no conflict of decision between Circuit Courts of Appeals or, for that matter, between any other courts. No novel questions of patent law were involved.

(b) The suit was the outgrowth of a patent pooling confederacy involving upward of 130 patents, relating to the distillation of petroleum, owned or controlled by a few financially powerful companies seeking to exact tribute from all petroleum refiners and manufacturers of refinery equipment outside of the confederacy.

(c) The plan led to an agreement to suppress evidence relative to the scope and validity of the pooled patents.

(d) The Lewis scheme involved only the addition of an open steam stripper—an admitted tool of the distilling industry—to a *side* stream of an old type of petroleum distilling unit comprising a pipe heater and a rectifying column having side and bottom stream draw-off lines and with open steam stripping of the *bottom* stream. The stripper in both locations does the same work; it effects the removal, by vaporization, of low boiling components from the streams en route to storage. At best it was a mere carrying forward, or more extended application, of an old device and therefore not patentable. *Smith* v. *Nichols*, 21 Wall. 112.

It was also pointed out that if the scheme of the patent in suit is not completely anticipated by *each* of a number of prior art patents, nevertheless it does not exhibit patentable invention for the reasons stated by this court in *Toledo Pressed Steel Co.* v. *Standard Parts, Inc.*, 307 U. S. 350, and in the cases there cited.

The present petition advances no meritorious ground for disturbing the decision of the Circuit Court of Appeals affirming the decree of the District Court, but makes a most attenuated technical contention only by which peti-

tioner seeks to advantage itself by the death of Judge Dickinson.

In addition to the grounds which were presented in opposition to the allowance of the original petition for writ of certiorari, it is submitted that the instant one should be denied for each of the reasons which follow:

POINT I.

The instant petition seeks exactly the same relief as the previous one denied by this Court, i. e., the vacation of the judgment of the Circuit Court of Appeals of Sept. 27, 1939, the only difference being in the grounds relied upon. Hence the instant petition is not timely filed.

As stated at the beginning of this brief, the instant petition, while *specifically* addressed to an order entered by the Circuit Court of Appeals on February 28, 1940 which denied the petition to that Court (filed subsequent to the denial by this Court of the first petition for certiorari) to vacate its judgment of September 27, 1939, in reality and in substance is a petition to review the legality of such judgment and to have the same ultimately vacated by this Court. Exactly the same purpose was sought to be accomplished by the first petition aforesaid. As the record shows, the facts upon which the instant petition is bottomed existed at the time of the filing of the first petition. Petitioner, by addressing the present petition to the order of the Circuit Court of Appeals entered on February 28, 1940, is thus clearly attempting to circumvent and escape the bar of the statute which prescribes that no appeal, or writ of certiorari, shall be allowed or entertained unless application therefor be made within three months after the entry of the "judgment or decree" sought to be brought before this court for review (28 U. S. C. Sec. 350).

If petitioner can avoid the bar of this statute by the device it adopted of filing a petition in the Circuit Court of

Appeals after this Court had denied its petition for a writ of certiorari, basing the former upon a different ground, or a different view of the facts exhibited by the record presented to this Court upon its first petition, then any unsuccessful litigant in a Circuit Court of Appeals could postpone the application of such statutory bar for a period measured only by his ability, or ingenuity, in framing additional criticisms of the "judgment or decree". To state this proposition, we submit, is to expose its sophistry and demonstrate that the present petition cannot be entertained.

It is, of course, a well settled rule that questions which were available and might have been, but were not, raised or presented on a prior appeal or writ of error, will not be considered on a subsequent one. A vast number of cases supporting this rule are collected in 1 American Law Reports, 725. It will be suffifficient here to call attention to only the following: *Illinois* v. *Illinois Central R. Co.*, 184 U. S. 77, 92-93; *Sorensen* v. *Pyrate Corporation*, 65 F. (2d) 982, where the Federal authorities are collected and discussed; *Raydure* v. *Lindley*, 268 Fed. 338, 341 (C. C. A. 6th); *Burns* v. *Cooper*, 153 Fed. 148, 151 (C. C. A. 8th); *Guaranty Trust Co.* v. *International Steam Pump Co.*, 242 Fed. 920, 921; *The Santa Maria*, 10 Wheat. 431, 433.

In the light of this general rule, as well as the familiar rule that a judgment is *res adjudicata* not only of the questions litigated in the case but of any questions that might have been litigated, and in view of the facts and considerations above referred to, it must follow, we submit, that the present petition is barred by the statute. As a question which might have been litigated in a former phase of the same suit, or in another suit between the same parties, but which was not so litigated, cannot thereafter be considered on a subsequent appeal in the same suit or in another suit between the same parties, *a fortiori* a question which might have been but which was not presented in a petition for a writ of certiorari filed within three months from the date of the entry of the judgment or de-

cree sought to be reviewed, cannot be asserted *after the expiration of such three months* as a means for attacking the same judgment through the exercise of any expedient.

If, by any chance, the instant petition might be considered as a petition for rehearing of the denial of the first petition (which it does not even purport to be), it could not be entertained because it was filed long after the 25 days allowed by Rule 33 of this Court for filing petitions for rehearing had expired.

Under the caption "Jurisdiction" in petitioner's brief, three cases are cited, presumably in support of petitioner's right to file a petition for certiorari to review "an order ruling upon an application for the vacating of a decree". These cases seem to us to be utterly irrelevant to the question as to whether this Court should grant a certiorari under circumstances present in this case. Indeed, two of the cases were before the Court on a writ of error and the third on a certificate from the Court of Appeals of the District of Columbia. For the convenience of the Court, if it desires to examine these cases, we have inserted a brief digest of them in an appendix.

POINT II.

The decision and judgment of September 27, 1939, were entirely valid and within the power of the Circuit Court of Appeals to render and enter.

It is clear that the decision of the court had been reached prior to the death of Judge Dickinson. The opinion announcing the decision was not entered until a few days after his death. The judgment was entered concurrently with the filing of the opinion and was the joint action of Judges Biggs and Buffington, who also signed the order of February 28, 1940, denying the petition for rehearing (R. 660rrr, 660sss). The statute creating Circuit Courts of Appeals (28 U. S. C. § 212) is as follows:

> "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, *of whom two shall constitute a quorum*, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established."

As two judges constitute a quorum, Judge Biggs and Judge Buffington had the power to enter the judgment of September 27, 1939, even though Judge Dickinson had died prior thereto. The order merely carried out the decision which had been reached in the case by the court prior to Judge Dickinson's death. It was a ministerial act giving effect to the court's decision. It does not follow, of course, that because Judge Buffington dissented from the decision, he thereby became disqualified as a member of the Court so that the Court could not enter an order making its own decision effective. *The decisive point is that the decision had been reached by the Court before Judge Dickinson's death.* The distinction between such a case and one where a decision *has not been reached before the death of one judge* and where the remaining two judges are in disagreement, is made apparent in *James* v. *Clements*, 217 Fed. 51 (C. C. A. 5th) where it was said:

> "*Before reaching a final conclusion* the death of Judge Shelby, who constituted a part of the court in the case, supervened, leaving only two judges to determine the matter, *and they not fully concurring* on certion points necessarily arising under the assignments of error.
>
> "*Under these circumstances* and that justice may be done, we feel compelled to grant the rehearing asked and order the case restored to the docket for reassignment and submission before a full bench."

This language carries the clear implication that if the Court had reached a "final conclusion" before the death of Judge Shelby, the decision would have been given effect.

Petitioner, in seeking to give a *decisive* position to the ministerial act of entering a judgment on a decision pre-

viously reached by an appellate court, completely overlooks that the judgment merely records a decision of the Court. Although that decision could, of course, be changed at any time prior to the entry of the order thereon and, indeed, thereafter, the fact is that *it was not changed* in the case at bar.

As a decision had been reached before Judge Dickinson's death, it would seem that the principle upon which this Court decided *Life & Fire Insurance Co. of New York* v. *The Heirs of Nicholas Wilson,* 33 U. S. 291, applies. There the judge who tried the cause died before the signing of the judgment, and this Court directed that a writ of mandamus be issued directing his successor to sign the judgment.

In the complete absence of a suggestion of fraud, it is submitted that this Court should not look behind these proceedings, which are not only fair and regular upon their face, but were accepted as such *by petitioner* in filing the original petition in this Court for a writ of certiorari.

POINT III.

Even were the decision and judgment of September 27, 1939, nugatory the present petition nevertheless should be denied.

On April 20, 1939, the court entered the following order (R. 660mm):

> "And now, to wit, April 20, 1939, after due consideration, the petition for second rehearing in the above entitled case is hereby granted."

The effect of that order was to vacate all previous orders of the Circuit Court of Appeals.

In *Hook* v. *Mercantile Trust Co.,* 95 Fed. 41 (l. c. 49), Judge Woods, speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

> "It is further contended that the judgment of this court rendered upon its first opinion was not vacated by the granting of a rehearing, and that, the judgment so rendered being still in force the motion to dismiss came too late. The petition of the appellees for a rehearing challenged the opinion of the court in its entire scope, and, as already explained, was granted for reasons equally comprehensive. *The intention of this court is that the granting of a rehearing without restriction shall operate to vacate its judgment, so that thereafter the cause shall stand as if no judgment had been entered.*"

To the same effect is *United States* v. *Bentley & Sons Co.*, 293 Fed. 229 (l. c. 237) (District Court, S. D. Ohio), where Judge Sater said:

> "A rehearing is simply a new hearing and a new consideration of the case on the same record. * * * *If granted, the attitude of the case is the same as if it had not previously been submitted.* * * * But when a judgment is opened up and the party obtaining the rehearing is again defeated and the previous judgment is affirmed, the original judgment is restored in full force and finally concludes all rights in the premises."

If the instant case, the Circuit Court of Appeals evidently so considered the order of April 20, 1939. This deduction follows from the fact that the order of September 27, 1939, is as follows (R. 660lll):

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the *decree of the said District Court* in this cause be, and the same is *hereby affirmed,* with costs."

It will be noted that this order does not *vacate* that of December 21, 1938, but simply *affirms* the order of the District

Court. At the conclusion of Judge Biggs' opinion he states (R. 660yy):

"We therefore reverse our former *conclusions* * * *."

Thus if, as contended by petitioner at bar, the legal effect of the equal division of the surviving members of the Circuit Court of Appeals on the second rehearing was to affirm the prior decision, it would be the decree of the District Court which would be affirmed, since all previous decisions of the Circuit Court of Appeals were vacated by the allowance of the petition for rehearing on April 20, 1939.

CONCLUSION.

In our view of the case, the various decisions cited under the caption "Argument" in petitioner's brief are so unrelated to the real questions at bar that we deem it unnecessary to discuss them.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

THOMAS G. HAIGHT,
WILLIAM F. HALL,
Counsel for Respondent.

APPENDIX.

In *Benjamin D. Harris* v. *William Hardeman, et al.*, 14 How. 334, the case was one brought to the Supreme Court by a writ of error from the Circuit Court of the United States for the Southern District of Mississippi. Therein the defendants in error moved the Circuit Court to quash a forthcoming bond, executed by the defendants to the plaintiff, and to set aside the judgment upon which the bond was founded upon the ground that the forthcoming bond was taken in execution of a judgment entered against the defendant Hardeman, when in truth there had been no service of original, or mesne, process upon him to warrant such judgment. The motion was granted upon the ground of lack of service and was affirmed by the Supreme Court.

In *Stevirmac Oil & Gas Co.* v. *C. E. Dittman*, 245 U. S. 210, Dittman brought suit in the United States District Court for the Eastern District of Oklahoma against Stevirmac Oil & Gas Co. and Virgil Hicks, to recover a money judgment. On December 1, 1913, the court rendered judgment by default against Stevirmac Oil & Gas Co. About eighteen months thereafter the latter company filed an application to set aside the default judgment, it being contended that the court had no jurisdiction to render judgment on account of lack of jurisdiction of the person of the defendant. The court refused to set aside the judgment and overruled the application of Stevirmac Oil & Gas Co. The question presented in the Supreme Court was whether the judgment of the District Court could be reviewed by direct writ of error from the Supreme Court to the District Court. The Supreme Court said:

> "But the attempt now made is to convert the writ of error into a means of reviewing the question of the jurisdiction of the court to render the original judgment. * * * The writ of error must be dismissed, and it is so ordered."

Swift & Co. v. *United States,* 276 U. S. 311, was initiated by the filing by the government of a petition under the Sherman Anti-Trust Act to enjoin violations of that statute and of the Clayton Act, with the object of putting to an end the monopoly ascribed to the defendants and to deprive them of the instrumentalities by which they were perfecting their attempts to monopolize. The petition sought a comprehensive injunction. Simultaneously with the filing of the petition, all of the defendants filed answers denying material allegations of the bill, but at the same time a joint stipulation was filed providing that without any finding of fact the court might enter the proposed decree therein set forth. This was done. Later motions to vacate the decree were filed in the case and were overruled by the District Court and an appeal prosecuted to the Court of Appeals for the District of Columbia. That court certified five questions to the Supreme Court, and the latter ordered that the entire record be certified to it, and upon consideration of the case upon its merits it held that it would assume jurisdiction of the case. After considering the several questions presented, it affirmed the decree of the District Court refusing to vacate the decree.

SEP 10 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 102.

THE ATLANTIC REFINING COMPANY, *Petitioner*,

v.

JAMES B. BERRY SONS' COMPANY, INC., *Respondent*.

RESPONDENT'S ANSWER TO PETITIONER'S REPLY BRIEF.

THOMAS G. HAIGHT,
WILLIAM F. HALL,
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In answer to petitioner's reply brief we desire to submit as follows:

POINT I.

Petitioner's Reply is Inconsistent Regarding the Purpose of Its Second Petition.

Petitioner first denies and then admits that the instant petition is addressed to the judgment of September 27, 1939, *which this Court refused to review.*

On page 1 of its reply brief, petitioner in substance denies that a review of the judgment of September 27, 1939, is its ultimate object. On page 3 of its brief, however, it is said: "* * * the instant petition seeks the setting aside of the purported judgment of September 27, 1939, * * *."

Manifestly the essential difference between the two petitions is that the earlier one is bottomed upon one ground, and the instant petition is bottomed upon another ground. *Both grounds are exhibited by the record filed with the first petition.*

The reason petitioner *elected* not to urge in its first petition (filed November 22, 1939) the point which is advanced in its second petition (filed May 25, 1940) is not explained.

We may assume either that petitioner considered the point to be without merit when it filed its first petition, or that it realized that a favorable action thereon bottomed on this point would, at best, ultimately lead only to a return of the case to the Circuit Court of Appeals for rehearing on its merits, and that eventuality petitioner wished to avoid.

Petitioner, having lost its attack upon the judgment of September 27, 1939, based upon the merits of the case, now occupies an "any port in a storm" position and, perforce, advances the point previously withheld.

To countenance such procedure would be to invite litigants to speculate upon the outcome in this Court of certiorari petitions and to encourage the filing of successive petitions limited in number and date only by the ingenuity of counsel to conjure up additional potential grounds of attack upon an adverse judgment.

POINT II.

The Instant Petition is Barred by Laches.

Petitioner, having lost its motion *for rehearing* belatedly filed in the Circuit Court of Appeals (submitted about *three months* subsequent to the expiration of the period provided by rule 27 of the rules of the Circuit Court of Appeals for the Third Circuit for the presentation of petitions for rehearing), now says that said motion was not for a rehearing (it was so termed by the Circuit Court of Appeals) but was a motion to vacate the judgment of Sep-

tember 27, 1939, and that there is no time limit for filing such a motion, unless indeed the delay amounts to laches. It suggests no yardstick for measuring laches. Irrespective of the name by which the motion calls itself, it was, as the Circuit Court of Appeals said, a petition for rehearing; vacating the judgment alone would have been an idle gesture. But assuming the distinction suggested by petitioner, rule 27 of the Circuit Court of Appeals nevertheless furnishes an appropriate yardstick for determining laches in such case.

However, 28 U. S. C. 350 presents a barrier which petitioner has made no attempt to and cannot hurdle.

POINT III.

Justice and Equity Dictate that on the Record in this Case the Judgment of the Circuit Court of Appeals Should Not Be Disturbed.

Petitioner's "any port in a storm" attitude is further shown by its grotesque assertion at page 10 of its reply brief to the effect that equity and justice demand that the whole refining industry should be blanketed by a monopoly under a patent found to be invalid by a decree of a District Court entered, after an open court trial, by an eminent judge of long experience, and from which decree *but a single member* of the Circuit Court of Appeals dissented in the *ultimate* disposition of the case by that Court.

We submit that the above caption is warranted by the following:

(a) After an open court trial and the submission of printed briefs and oral arguments, the District Court found the patent in suit invalid because what it claims involves mechanical skill only, and was anticipated by others, and filed a written opinion to this effect and appropriate findings of fact and conclusions of law.

(b) Rule 52 of the Rules of Civil Procedure provides that "Findings of fact shall not be set aside unless clearly

erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Many cases are to the same effect; among them, *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, and *Butte & S. Copper Co.* v. *Clark-Montana Realty Co.*, 249 U. S. 12.

(c) Of the three judges who sat in the Circuit Court of Appeals on the several arguments which were had, Judge Buffington only was in disaccord with the decree of the District Court in the final disposition of the case on its merits by the appellate court.

(d) Judge Buffington wrote the initial opinion of the latter Court and the reasons given therein for the ultimate conclusion expressed were wholly discarded in the subsequent opinions of the Court.

(e) In the final conclusion of the Court, both Judge Biggs and Judge Dickinson[1] were in accord with District Judge Gibson, and Judge Buffington only was contrary-minded.

(f) In denying *per curiam* the petition for rehearing, the Court said that Judge Buffington had joined in authorizing the entry of the order of September 27, 1939, which is signed by Judge Biggs.

We submit that the facts recited preclude petitioner from gaining any advantage by the death of Judge Dickinson, which occurred after the final argument but prior to the mere ministerial act of entering the judgment of the Court, and *refute petitioner's assertion that justice and equity will be defeated if the District Court's decree is not reversed.*

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[1] There has been no suggestion of falsity in Judge Biggs' statement that Judge Dickinson participated in the decision. The statement is corroborated by the circumstance that Judge Buffington's opinion is termed a "dissenting" opinion and that he joined in the entry of the judgment affirming the decree of the district court.

Point IV.

It Would Be Supererogation to Give Extended Consideration to the Many Citations in Petitioner's Reply Brief.

In support of the foregoing caption we submit (a) what is said under Point II herein, and (b) that the great number of citations in petitioner's reply brief and the emphasis which it places upon *Florida Motor Lines* v. *Hill* are convincing that it has been unable to find *a decision of a Federal Court* in which a holding is made contrary to the explicit statements contained in the two Federal Court decisions cited by respondent, *i. e., Hook* v. *Mercantile Trust Co.,* 95 Fed. 41, and *United States* v. *Bentley & Sons Co.,* 293 Fed. 229. In the reply brief it is said that respondent relies upon "dicta" in these two cases. Petitioner evidently failed to note that *Florida Motor Lines* v. *Hill,* which it so strongly presses, purports to be based mainly upon *ratio decidendi,* which, moreover, was misunderstood. In the decision in the last named case, there is emphasized the following (143 So. 262):

(a) That "petitions for rehearing are *under our rules*[1] filed and considered as ex parte matters"; and

(b) That the court was "controlled by the *ratio decidendi*" of *Carmichael* v. *Eberle,* 177 U. S. 63, and acted "upon the authority of that case."

The rules of practice of the Supreme, Circuit and County courts of Florida, in respect to applications for rehearing (rule 25), expressly provide that "the court will consider the petition without argument." In contradistinction in the case at bar, *petitioner did file an argument* opposing the allowance of the petition for rehearing; a fact to which petitioner does not allude.

The Supreme Court of Florida in *Florida Motor Lines Lines* v. *Hill* manifestly *misunderstood* the facts in *Carmichael* v. *Eberle.* The latter is not an authority for the holding in the former.

The *ratio decidendi* of the *Carmichael* case is that upon the consideration of *an application* to an appellate court

[1] Italics ours.

for a rehearing of its own judgment, if there is an equal division of the members of the court *on the question whether the rehearing should be allowed,* then that question must be resolved in the negative. Since the application was denied in the case under consideration, necessarily the judgment of the court which had been attacked remained unaffected and this Court so held. In the *Carmichael* case this Court expressly said, "The contention of plaintiff in error is that a rehearing *was granted,*[1] and that, as the court was equally divided on such alleged rehearing, the judgment of the district court was affirmed."

This Court did not reject as unsound the point of law involved in this contention. *But it found that a rehearing had not been granted.* We submit that had this Court found petitioner's fact contention justified, it would not have found it unsound in law.

We suggest that the formal granting of a rehearing by a Circuit Court of Appeals in respect to its own judgment, after the consideration of printed arguments submitted by the respective parties, as occurred in the case at bar, if it does not have the effect of completely vacating its judgment so that thereafter the cause stands as if no judgment had been entered, as stated in effect in *Hook* v. *Mercantile Trust Co.* and *United States* v. *Bentley & Sons,* does, at least, cast such doubt upon the soundness of the judgment that unless it is reaffirmed by a majority of the members participating in the final disposition of the case, the measure of certainty of error is not present necessary to justify the reversal of the district court.

CONCLUSION.

It is respectfully submitted that the present petition should be denied.

Respectfully submitted,

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[1] Italics ours.